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Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

YONA BOYD AND BRENDA COLLIER,
Petitioners,

v.

DONALD BRUCE, M.D. and
D&C PROPERTY MANAGEMENT CORP.,
Respondents.

On Petition for
Writ of Certiorari to the
Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Tennessee state judiciary – a branch of state government – denied Petitioners' First Amendment right to government redress of grievances by giving claim-preclusive effect to a non-merit procedural order?

Whether the Tennessee state judiciary denied Petitioners' federal pension rights under ERISA by giving claim-preclusive effect to a non-merit state procedural order?

Whether the Tennessee state judiciary denied Petitioners' federal substantive due process by denying a hearing on the merits upon Petitioners' re-filing their claim under Tennessee Code Annotated 28-1-105(a)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. D&C Property Management Corp. is a corporation wholly owned by Donald Bruce, M.D.

REFERENCE OF COURT OPINIONS

The order of the Tennessee Supreme Court denying permission to appeal appears at **Appendix A** and is unpublished.

The order of the Tennessee Court of Appeals denying a rehearing appears at **Appendix B** and is unpublished.

The opinion of the Tennessee Court of Appeals appears at **Appendix C** and is unpublished.

The state-court briefs wherein federal issues are raised appears at **Appendix D.**

Tennessee's re-filing statute T.C.A. 28-1-105(a) appears at **Appendix E**.

The trial court orders appear as **Appendix F**.

JURISDICTIONAL GROUNDS

Entry of Judgment/Rehearing

The Tennessee Supreme Court denied an appeal to Petitioners on February 11, 2002. No petition for rehearing was filed because the Tennessee Supreme Court did not disturb the opinion of the Tennessee Court of Appeals. The All Writ Act and 28 U.S.C. 1254 confer jurisdiction upon this Court to correct any denial of federal constitutional rights to Petitioners.

Constitutional and Statutory Provisions

The First Amendment to the u.s. Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the people peaceably to assemble, and to petition the government for a redress of grievances."

The pension and vacation pay benefits sued for would also provide a basis for a cause of action under

ERISA. 29 U.S.C. 1132(a)(1)(B); 29 U.S.C. 1002(1). State courts have jurisdiction to order employers to pay such pension and vacation pay benefits to employees concurrent with federal courts. 29 U.S.C. 1132(e)(1). But, in cases involving an employment contract such as the instant case, a federal court would necessarily rely on state common law. *Adcock v. Firestone Tire & Ruber Co.*, 616 F.Supp. 409, 414, 416, 417-418 (M.D. Tenn. 1985), *rev'd in part on others grounds*, 822 F.2d 623 (6th Cir. 1986). Therefore, the instant suit in state court was identical in law and fact to a suit which could have been brought in federal district court solely for the pension and vacation pay benefit portion of the initial case.

Concise Statement of Case

In the trial-court decisions, Petitioners sued the correct party - their former employer Donald Bruce, M.D. – for unpaid pension and other benefits totaling over $30,000. In a preliminary procedural order concerning the proper party, the first trial court ruled that Dr. Bruce was really not their employer and named a payroll-processing company Prime Focus, Inc. as the employer. In compliance with the court's decision, Petitioners sued Prime Focus. The court then ruled that Prime Focus was not the actual employer, and that Bruce was the correct party to sue after all. In compliance with the statute Tennessee Code Annotated 28-1-105(a), appellants re-sued Dr. Bruce – whom they had sued in the first place. But the trial court said that its first decision was *res judicata*, and barred a decision on the merits of the case, despite the clear language of the 144-year-old statute establishing petitioners'' statutory right to re-file a case.

The federal question of ERISA was raised by Respondents at the trial court stating that the case should be heard in federal court. Petitioners addressed this question at the trial court and the appeals court that both federal and state courts have ERISA jurisdiction per 29 U.S.C. 1132(e)(1). The federal question of Petitioner's re-filing rights (T.C.A. 28-1-105(a)) was raised in oral argument on a motion for

summary judgment at the trial court, within a petition for rehearing per the appellate rules of Tennessee, *Hathorn v. Lovorn*, 457 U.S. 255, 262-265, 102 S.Ct. 2421, 2426-2428, 72 L.Ed 824 (1982), and within the appellate brief to the Tennessee Supreme Court (Appendix D).

All Tennessee state courts remained silent on the federal issues in the instant case.

Consideration for Writ of Certiorari

The Tennessee Supreme Court, as the court of last resort of Tennessee, failed to ensure that the courts of the state granted hearings to litigants on the merits of a case based on the state's own statute Tennessee Code Annotated 28-1-105(a), *Adams v. Carter County Memorial Hosp.*, 548 S.W.2d 307, 308, 309, 310 (Tenn. 1977); *see also W.R. Grace & Co. v. Taylor*, 398 S.W.2d 81, 83 (Tenn. Ct. App. 1965), and thus denied First and Fifth Amendment due process to Petitioner. *See Love v. Bolinger*, 927 F.Supp. 1131, 1138 (S.D. Ind. 1996); *Monsky v. Moraghan*, 127 F.3d 243, 247 (2nd Cir. 1997). This Court must prevent the fundamental doctrine of *res judicata* from being used by state courts as a cover to falsely label decisions as "on the merits" when such decisions should actually have no claim-preclusive effect; which state court actions directly conflict with decisions of the Supreme Court of the United States. *E.g. Semtek Int'l v. Lockheed Martin Corp.*, ____ U.S. ____ (2001), (Scalia, J., op.); *see also South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167, 119 S.Ct. 1180, 1185, 143 L.Ed.2d 258 (1999); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-429, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982).

CONCLUSION

Based on the foregoing, Petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted:

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APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

YONA BOYD, ET AL. V. DONALD BRUCE, M.D., ET AL.

Circuit Court for Davidson County
No. 00C2059

No. M2000-03211-SC-R11-CV

Filed
Feb 11 2002
Clerk of the Courts

ORDER

Upon consideration of the application for permission to appeal of Yona Boyd and Brenda Collier, and the record before us, the application is denied.

PER CURIAM

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

YONA BOYD, ET AL. V. DONALD BRUCE. M.D., ET AL.

Circuit Court for Davidson County
No. 00C2059

No. M2000-03211-SC-R11-CV

Filed
Nov 21 2001
Clerk of the Courts

ORDER

Appellants have filed a petition for rehearing of our opinion filed earlier in this case. Having fully reviewed the petition and the grounds state therein, we are of the opinion that the petition should be denied.

Therefore, it is ordered that Appellants' petition for rehearing is denied.

/s/_____
WILLIAM B. CAIN, JUDGE

/s/_____
PATRICIA J. COTTRELL, JUDGE

/s/_____
FRANK G. CLEMENT, JR., SPECIAL JUDGE

APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 7, 2001 Session

YONA BOYD, ET AL. v. DONALD BRUCE, M.D., ET AL.

Appeal from the Circuit Court for Davidson County
No. 00C2059 Thomas W. Brothers, Judge

No. M2000-03211-SC-R11-CV

Filed
Nov 2 2001
Clerk of the Courts

This appeal arises from the third effort of the plaintiffs to obtain compensation and other employment benefits from their former employer. The same claims were first filed in Chancery Court against the doctor and his management company, and the complaint was dismissed for failure to state a claim upon which relief can be granted and failure to join an indispensable party. Thereafter, the plaintiffs fled suit in Chancery Court against the company which supplied the employee handbook and other services to the doctor. That case was dismissed on a motion for summary judgment. The plaintiffs then again file suit against the doctor-employer in Circuit Court. The Circuit Court dismissed the case by converting the doctor-employer's motion for Rule 11 sanctions into a motion to dismiss on the basis of *res judicata*. The plaintiffs now appeal that dismissal to this court. We affirm the trial court's dismissal.

Tenn. R. App. P. 3 Appeal As Of Right;
Judgment Of The Circuit Court
Affirmed And Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN, J., and FRANK G. CLEMENT, JR., SP. J., joined.

David E. Danner, Nashville, Tennessee, for the appellants, Yona Boyd and Brenda Collier.

Thomas L. Whiteside, Nashville, Tennessee, for the appellees, Donald Bruce, M.D. and D&C Property Mgmt. Corporation.

OPINION

Because this case is brought before us on the issue of *res judicata*, the procedural history of this and related cases is relevant and, therefore, outlined below.

Yona Boyd and Brenda Collier ("Appellants") filed suit against Donald Bruce, M.D. ("Bruce") and D&C Property Mgmt., Corp. ("D&C") (or collectively "Appellees") on August 19, 1999, in the Chancery Court for Davidson County seeking compensation based on an alleged employer-employee relationship.[1] In their complaint, Appellants relied on an employee handbook written by Prime Focus, Inc. ("Prime Focus"), an Illinois corporation that administered Appellees' payroll and provided employee policies to Appellees, including the handbook outlining the rights and duties of employees. That case, *Yona Boyd and Brenda Collier v. Donald Bruce, M.D., D&C Prooperty Mgmt. Corp.*, case no. 99-2350-II, will be referred to as Case 1.

On December 8, 1999, the Chancery Court ruled in Case 1 that the Prime Focus employee handbook "unequivocally establish[es] the existence of an employer-employee relationship by and between the [Appellants] and Prime

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[1] The underlying facts of this case are not relevant to this appeal.

Focus, Inc." and that "no employer-employee relationship existed between the [Appellants] and [Bruce] and [D&C]." Further, the court found that Bruce and D&C[2] were clients of Prime Focus and, consequently, Prime Focus was an indispensable party. Therefore, Case 1 was dismissed by the court for failure to join an indispensable party, Prime Focus, and for failure to state a claim upon which relief can be granted.

Appellants did not appeal the Chancery Court's decision, but instead, after that dismissal was final, filed suit against Prime Focus in Chancery Court. That case, *Yona Boyd and Brenda Collier v. Prime Focus, Inc.*, case no. 99-3716-II, will be referred to as Case 2.

After suit against Prime Focus in Case 2, Appellants filed a Motion to Set Aside the Judgment under Tenn. R. Civ. P. 60.02 in Case 1 and to Consolidate Case 1 and Case 2. The Chancery Court denied this Motion because "the [Appellants] did not file a notice of appeal from the Court Order [in Case 1] which [Appellant] now seeks to set aside." Further, the Court found that since Appellants "failed to take the necessary legal steps to protect their own interest in this matter they are precluded from relief under Tenn. R. Civ. P. 60.02." Appellants did not appeal this second order in Case 1.

In their suit against Prime Focus, Case 2, Appellants attempted to amend their complaint to add Bruce and D&C. In granting a motion for Rule 11 sanctions, the trial court struck the amended complaint which, in the words of the court, "asserted previously litigated claims.: Further, in Case 2 Prime Focus filed a Motion for Summary Judgment based on the fact that Prime Focus was not Appellants' employer. The Chancery Court granted Prime Focus's motion and found that Appellants were not employed by Prime Focus. The court found that Prime Focus was an employee leasing firm,

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[2] The complaint alleged that D&C was owned by Dr. Bruce and that D&C was the employer of Appellants.

primarily for purposes of consolidating employees of small business for purchasing health insurance, and the "Prime Focus exercise[d] no control over the hiring, firing or compensation procedures or policies of its small business customers [such as Appellees]." Based upon the loaned servant doctrine, the court determined that Appellants "must be dealt with as the servants of the one to whom they were lent, Bruce/D&C." The Appellants appealed this decision; argument on that appeal was heard on July 10, 2001.

On October 20, 2000, Appellants then filed a Motion to Amend Order in Case 1, the second motion they filed pursuant to Tenn. R. Civ. P. 60.02 in Case 1. In that motion Appellants requested that the court delete the phrase "failure to state a claim upon which relief can be granted" because it was a "conclusory misnomer." Appellants argued that the deletion of this phrase would no longer make the order an adjudication on the merits. This motion was denied on January 8, 2001, and Appellants filed a notice that stated that they "hereby appeal ... the order ... denying the motion to amend the court's prior order of December 8, 1999, announced in open court on November 3, 2000." That appeal is set to be heard on a later docket of this court.

Prior to filing the motion to amend the order in Case 1 in Chancery Court, Appellants filed suit against Bruce and D&C in Circuit Court for Davidson County, in Case 3. In this most recent suit, Appellants claimed that they were third-party beneficiaries of the contract between Prime Focus and Bruce and D&C and that Appellees are liable under a loaned servant doctrine. Appellants filed a Motion for Summary Judgment. In response, Appellees filed, among other things, a Motion for Sanctions pursuant to Tenn. R. Civ. P. 11.

The Circuit Court, after hearing arguments of counsel entered a final order finding that Appellees' "Motion for Rule 11 Sanctions [was] in essence a Motion to Dismiss...predicted on the ground that the plaintiffs' current action is barred by the doctrine of *res judicata*." The Court found that Appellants' case should be involuntarily dismissed

on the basis that *res judicata* bars Appellants' action. Appellants appealed from this dismissal of Case 3, and that is the subject of the case before us.

The complaint in Case 3 recited the history of the earlier litigation in this dispute; attached to the complaints were the complaints which had been filed in Case 1 and 2 as well as the Chancery Court's final orders. The complaint (in Case 3) states:

> A court of competent jurisdiction has ruled that (A) no employer-employee relationship existed between the parties in the instant action [citing the attached final order in Case1], (B) the employer-employee relationship existed between Plaintiffs and Prime Focus [citing the attached final order in Case 2], (C) Prime Focus is not liable to Plaintiffs because the loaned servant doctrine made the Defendants in the instant cause liable to compensate Plaintiffs. Thus, a court of competent jurisdiction has ruled that the Defendants in the instant case are liable to compensate Plaintiffs although no employer-employee relationship existed between them [quoting and citing the final order in Case 2].

Appellants filed a Motion for Summary Judgment, and Appellees responded with a Motion for Rule 11 Sanctions, attaching the letter sent to Appellants' counsel in accordance with Tenn. R. Civ. P. 11.03(1)(a), giving counsel twenty-one days to withdraw the complaint in Case 3. The basis for the sanction motion was that the complaint in Case 3 included no factual basis which had not been raised in Case 1 for liability of Bruce and D&C as employers. These matters having been previously litigated, Appellees asserted Appellants' claims in Case 3 were barred by the doctrine of *res judicata*.

In response to the Rule 11 motion, Appellants asserted that such sanctions were not warranted because the order in Case 1 was not a final adjudication on the merits, but also asserted that the order in Case 2 was res judicata on the issue

of which parties were the employers of Appellants. The response also asserted the Rule 11 motion was filed in an attempt to obtain dismissal prior to determination of Appellants' pending Motion for Summary Judgment.

The trial court determined that, contrary to Appellants' assertions, Case 1 had been dismissed for failure to state a claim upon which relief can be granted as well as failure to join an indispensable party; it was bound by the Chancery Court order explicitly stating Case 1 was dismissed for failure to state a claim; that the dismissal of Case 1 was with prejudice; and that Appellants' claims were barred by the doctrine of *res judicata* since Appellants had "previously litigated this matter."

Res judicata is a claim preclusion doctrine that promotes finality in litigation. *Lien v. Couch*, 993 S.W.2d 53,55 (Tenn. Ct. App. 1998). The doctrine bars a second suit between the same parties on the same cause of action as to all issues which were or could have been litigated in the former suit. *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 459 (Tenn. 1995); *Massengill v. Scott*, 738 S.W.2d 629, 631 (Tenn. 1987).

The principle of claim preclusion prevents parties from splitting their cause of action; it requires parties to raise in a single lawsuit all the grounds for recovery arising from a single transaction.[3] *Lien*, 933 S. W.2d at 56. Consequently, the doctrine of *res judicata* bars the litigation not only of those matters actually determined in the prior action, but also those that reasonably could have been litigated in the prior

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[3] In a prior holding this court stated:

> The rule [of *res judicata*] requires that the whole subject of the litigation be brought forward by the parties, and the judgment concludes all matters, whether of action or defense, legally pertaining to that subject which, by the exercise of reasonable diligence, might have been brought forward.

McKinney v. Widner, 746 S.W.2d 699, 705 (Tenn. Ct. App. 1987).

action. *Brown v. Brown*, 29 S.W.3d 491, 495 (Tenn. Ct. App.2000).

> It has long been the rule in this state that not only issues which were actually determined, but all claims and issues which are relevant and which could reasonably have been litigated in a prior action, are foreclosed by the judgment therein.

American Nat'l Bank and Trust v. Clark, 586 S.W.2d 825, 826 (Tenn. 1979). Where all "claims and theories" asserted in the later litigation had accrued and were available for litigation in the prior action, *res judicata* applies. *Id.* at 827. Thus, the former judgment is conclusive "not only as to matters actually put at issue, but equally to those which by due diligence of the litigant...might have been put in issue and determined." *Brown*, 29 S.W.3d at 496 (quoting *Hayes v. Civil Serv. Comm'n of Metro. Gov't*, 907 S.W.2d 826, 828 (Tenn. Ct. App. 1995)). A prior judgment does not, however, operate to prohibit the later consideration of rights that had not accrued at the time of the earlier proceeding or the re-examination of the same question between the same parties when the facts have changed or new facts have occurred that have altered the parties' legal rights and relations. *Lien*, 993 S.W.2d at 56; *White v. White*, 876 S.W.2d 837, 839-40 (Tenn. 1994).

The party asserting the defense must demonstrate: (1) that the underlying judgment was rendered by a court of competent jurisdiction; (2) that the same parties were involved in both suits; (3) that the same cause of action was involved in both suits; and (4) that the underlying judgment was final and on the merits. *Lien*, 993 S.W.2d at 56; *Collins v. Greene Co. Bank*, 916 S.W.2d941, 945 (Tenn. Ct. App. 1995).

The prior case upon which the claim of *res judicata* rests herein is the original action brought by Appellants in Chancery Court against the same defendants, Case 1. The Chancery Court was a court of competent jurisdiction.

Chancery Court had jurisdiction over the parties, and the parties were clearly the same.

Both lawsuits involve Appellant's attempts to collect additional compensation on the basis of terms of employment they allege were set out in the employee handbook. Both lawsuits involve the same dates of employment. Appellants' employment was terminated in 1999, prior to their bringing Case 1; no new facts occurring since that time have been alleged in the complaint in Case 3.[4] We conclude both Case 1 and Case 3 involve the same cause of action. We disagree. A change in Appellants' theory of liability does not create a new cause of action. Appellants argue that facts revealed in subsequent lawsuits regarding who was the real employer and the decision of the court does not create a new cause of action. We disagaree. A change in Appellants' theory of liability does not create a new cause of action. Tennessee law is clear that *res judicata* bars the litigation of all issues that could have been litigated and all facts pertaining to those issues that could have been brought forward. "The fact that [plaintiff] has identified another argument to support his constitution challenge does not alter the fact that the issue was resolved in the first...proceeding." *Richardson*, 913 S.W.2d at 461.

The final requirement for application of the doctrine of *res judicata* is that the underlying judgment must have been a final adjudication on the merits. *Roy v. Diamond*, 16 S.W.3d 783, 787 (Tenn. Ct. App. 1999). It must have been final and must have concluded the rights of the party against whom the *res judicata* defense is asserted. *Richardson*, 913 S.W.2d at 459. In Tennessee, a judgment is final "when it decides and disposes of the whole merits of the case leaving nothing for the further judgment of the court." *Richardson*, 913, S.W.2d at 460 (quoting *Saunders v. Metropolitan Gov't of Nashville & Davison County*, 214 Tenn. 703, 383 S.W.2d 28, 31

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[4] The complaint alleged the procedural history of the litigation over this dispute, but no further dealings between the parties.

(1964)). While denial of a motion to dismiss does not constitute a final judgment, *id*,. the grant of such a motion is a final judgment. The Chancery Court's judgment in Case 1 entered on December 8, 1999, was a final adjudication, and that judgment was not appealed.[5]

Whether a dismissal is a judgment which invokes the doctrine of *res judicata* depends upon whether the dismissal was made on the merits. *Lewis v. Muchmore*, 26 S.W.3d 632, 637 (Tenn. Ct. App. 2000); *Hart v. Tourte*, 10 S.W.3d 263, 267 (Tenn. Ct. App. 1999). In *Tourte*, this court determined that dismissal of a prior proceeding because plaintiff failed to attach a properly authenticated foreign judgment to his petition for registration was dismissal on a non-merits ground and, therefore, *res judicata* did not preclude the second lawsuit. *Tourte*, 10 S.W.3d at 267. Similarly, in *Muchmore*, this court determined that the record prevented us from determining whether the first litigation had been dismissed because of a procedural defect or on the merits. *Muchmore*, 26 S.W.3d at 637. Because the party asserting *res judicata* as a defense bears the burden to substantiate it, we held the later lawsuit was not barred. *Id.*

Thus, dismissal for procedural defects is not a determination on the merits so as to support a claim of *res judicata*. Where, however, a complaint has been dismissed

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[5] Although "where the former suit is still pending, a judgment rendered therein is not *res judicata*, "*McBurney v. Aldrich*, 816 S.W.2d 30, 34 (Tenn. Ct. App. 1991), and the appeal of the denial of the second Rule 60.02 motion is still pending before this court, the court's final order in Case 1 is still final for purposes of *res judicata*. Tenn. R. Civ. P. 60.02 states:

> A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation, but the court may enter an order suspending the operation of the judgment upon such terms as to bond and notice as to it shall seem proper pending the hearing of such motion.

Tenn. R. Civ. P. 60.02.

for failure to state a claim upon which relief can be granted, such a dismissal is considered an adjudication on the merits. *Rampy v. ICI Acrylics, Inc.*, 898 S.W.2d 196, 198 (Tenn. Ct. App. 1994); *Rainey Brothers Construction Company, Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F.Supp. 998, 1003 (W.D. Tenn. 1997). This holding has two bases. First,

> A rule 12.02(6) motion to dismiss, like the demurrer under earlier Tennessee law, tests the legal sufficiency of the party's pleading. *See Cornpropst v. Sloan,* 528 S.W.2d 188, 190 (Tenn. 1975). In a case predating Rule 12.02(6), the Tennessee Supreme Court held that the sustaining of a demurrer has the effect of a decision on the merits regardless of whether the factual allegations are sufficient to support a cause of action. *Isham v. City of Harriman*, 223 Tenn. 461, 447 S.W.2d 364 (1969).

Dyer v. Itnera Corp., 870 F.2d 1063, 1066 (6th Cir. 1989). The *Dyer* court also found that Tenn. R. Civ. P. 12.02(6) is based upon Fed. R. Civ. P. 12(b)(6) and that in federal courts a dismissal pursuant to that rule is considered "a decision on the merits with full *res judicata* effect." *Id.*

Since 1989, when the Dyer case was decided, Tennessee court have reaffirmed that the purpose of a Rule 12.02(6) motion is to test the legal sufficiency of the complaint or petition. *421 Corp. v. Metropolitan Gov't of Nashville and Davidson Co.*, 36 S.W.3d 469, 479 (Tenn. Ct. App. 2000); *Harvey v. Ford Motor Credit Co.*, 8 S.W.3d 273, 276 (Tenn. Ct. App. 1999); *Rampy v. ICI Acrylics, Inc.*, 898 S.W.2d 196, 198 (Tenn. Ct. App. 1994); *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992). Therefore, as a Rule 12.02(6) motion tests the legal sufficiency of the complaint, a dismissal under that rule is an adjudication on the merits.

The second basis for the conclusion that a Tenn. R. Civ. P. 12.02(6) dismissal is a dismissal on the merits is found in

Rule 41.02(3) of the Tennessee Rules of Civil Procedure, which states:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41. other than dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits.

Because dismissal for failure to state a claim is not one of the exceptions listed, the plain language of this rule requires a conclusion that such a dismissal is an adjudication on the merits. The trial court in Case 1 did not specify that its decision was not to act as a final adjudication. Therefore, we hold that the dismissal of Appellants' first case, Case 1, on the Rule 12.02(6) motion was an adjudication on the merits.[6]

Accordingly, we affirm the trial court's dismissal of this lawsuit because Appellants' claims were barred by the doctrine of *res judicata.*

Appellants also argue that the trial court should have granted their Motion for Summary Judgment because Appellees did not respond to the motion by filing affidavits setting forth facts showing a genuine issue of fact.[7] However, this argument ignores one of the basic requirements for fact **and** the moving party must be entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Bain v. Wells,* 936 S.W2d 618, 622 (Tenn. 1997): *Carvell v. Bottoms,* 900 S.W.2d 23, 26 (Tenn. 1995); *Byrd v. Hall,* 847 S.W.2d 208, 214 (Tenn. 1993). Thus, summary judgment should be granted only

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[6] To the extent that Appellants' real complaint is that the Chancery Court incorrectly decided Case 1, the correctness or incorrectness of the former adjudication is not before this court in this appeal. The proper method for challenging the correctness of that judgment was an appeal from it. Madyun v. Ballard, 783 S.W.2d 946, 948 (Tenn. Ct. App. 1989).

[7] Appellees responded to Appellants' statement of material facts, and filed an unsigned affidavit of Dr. Bruce.

when the undisputed facts reasonably support one conclusion, namely that the moving party is entitled to a judgment as a matter of law. *McCall v. Wilder*, 913 S.W.2d 150, 153, (Tenn. 1995).

Obviously, a party whose complaint fails to state a claim for relief is not entitled to a judgment as a matter of law. Appellants were properly denied summary judgment because their lawsuit was precluded by *res judicata*.

Appellants also argue that the trial court improperly converted Appellees' Rule 11 Motion for Sanctions as a Motion to Dismiss.[8] A trial court need not wait for a party to file a motion to dismiss under Rule 12.02(6), for it possesses the authority to dismiss the petition sua sponte if the pleading fails to state claim on which relief can be granted. *Huckeby v. Spangler*, 521 S.W.2d 568, 571 (Tenn. 1975); *see also Lackey v. Carson*, 886 S.W.2d 232, 232 (Tenn. Ct. App. 1994).

> Defenses of failure to state a claim and the lack of jurisdiction of the court are not waived by filing an answer to complaint. Tenn. R. Civ. Proc. 12.08. They may be raised at any time even at a trial on the merits, *id.*, and the court has the authority to dismiss the complaint sua sponte.

Cockrill v. Everett, 958 S.W.2d 133, 135 (Tenn. Ct. App. 1997) (citing *Huckeby v. Spangler*, 521 S.W.2d at 511).

We find that the trial court appropriately used its authority to dismiss Appellants' case. The court's action was in response to the motion for sanctions and was based upon the history of prior litigation between the parties as set out in the complaint as well as in the motion for sanctions. Appellants were certainly aware of the issues and argued in

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[8] The motion for sanctions was based upon the prior litigation between the parties. In addition to sanctions, the motion requested that Appellants be precluded from asserting a claim against Dr. Bruce and D&C.

the complaint the reasons why *res judicata* did not preclude this lawsuit.

The judgment of the trial court is affirmed. This cause is remanded to Circuit Court of Davidson County for any necessary further proceedings consistent with this opinion. Costs on appeal are taxed to Appellants.

/s/_____

PATRICIA J. COTTRELL, JUDGE

APPENDIX D

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

YONA BOYD, ET AL. v. DONALD BRUCE, M.D., ET AL.

Circuit Court for Davidson County
No. 00C-2059

No. M2000-03211-SC-R11-CV

ON APPEAL FROM THE TWENTIETH JUDICIAL
DISTRICT CIRCUIT COURT FOR DAVIDSON COUNTY
THE HONORABLE THOMAS W. BROTHERS, JUDGE

BRIEF OF THE APPELLANTS, YONA BOYD AND BRENDA COLLIER

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ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

YONA BOYD, ET AL. v. DONALD BRUCE, M.D., ET AL.

Circuit Court for Davidson County
No. 00C-2059

No. M2000-03211-SC-R11-CV

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Appellate Court Clerk
Nashville

ON APPLICATION FOR APPEAL BY PERMISSION
FROM THE JUDGMENT OF THE COURT OF APPEALS,
MIDDLE SECTION

APPLICATION FOR PERMISSION TO APPEAL ON BEHALF OF THE APPELLANTS, YONA BOYD AND BRENDA COLLIER

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Section 17, guarantees to state citizens open courts and redress of injuries, to wit:

> That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.

Appellants have been denied redress and delayed for years because a succession of lower court judges has precluded them from a decision on the merits based on such jurists giving *res judicata* effect to a non-merit order or procedural law of this state. *See* Canon 3(B)(2), Code of Judicial Conduct (requires judges to be faithful to the law, which definition includes court rules). The Tennessee Supreme Court must exercise its supervisory authority, pursuant to T.R.A.P. 11(a)(4), because such redress is the first possible redress to correct a denial of rights by the state court system itself.

II.

Because Tennessee procedural and constitutional law provide no independent and adequate grounds for the decision of the Court of Appeals (Attachment 2), then serious constitutional questions come into play arising from Appellants' fundamental right to access to the courts. U.S. Const., Amend. 1; Tenn. Const., Art. 1, § 17; *Acevedo v. Surles*, 778 F.Supp. 179, 184 (S.D.N.Y. 1991). Appellants were of course able to file suit, but did not have to be barred at the courthouse door in order to be deemed to be denied access to the courts. See Love v. Bolinger, 927 F.Supp. 1131, 1138 (S.D. Ind. 1996). Formal access to the courts is not enough; such access must also be adequate, effective, and meaningful in order for the pursuit of a legal claim not be hindered. See Id; see also Monsky v. Moraghan, 127 F,3d 243, 247 (2nd Cir. 1997); Tenn. Const., Art. 1, § 17. Appellants, to date, have been effectively denied open courts by trial and appellate jurists because (1) the lower courts have

produced no decision on the merits and gave *res judicata* effect to a non-merit order or procedural dismissal, (2) the lower courts recognized both conflicting orders of the Chancery Court, but arbitrarily gave preclusive effect only to the first (non-merit) order or procedural dismissal order which held that Appellees were not liable to Appellants and arbitrarily gave no legal effect to the second (merit) order which held that Appellees were liable to Appellants, and (3) the lower courts found that the first order of the Chancery Court stated both " failure to join and indispensable party" and "failure to state a claim for which relief can be granted", but arbitrarily gave *res judicata* effect to such order based only on the trite phrase failure to state a claim for which relief can be granted: when T.R.C.P. 41.02(3) expressly states that a dismissal for lack of an "indispensable party" is not an adjudication on the merits.

III.

The December 8, 1999 order was based on a fraud having been committed on the court, resulting in the following corrective finding in the Chancery Court's subsequent July 6, 2000 order, to wit: "The undisputed facts, as well as admissions and arguments of Plaintiffs demonstrate that Prime Focus exercises no control over the hiring, firing or compensation procedures or policies of its small business customers [such as appellees]. In addition, it is undisputed that the employment manual relied upon by the Plaintiffs was never provided to Plaintiffs at the direction of Prime Focus since it had been replaced and was no longer valid several years prior to Plaintiffs' employment." Appellees thus committed a fraud on the trial court, leading to the December 8, 1999 order ***(see Attachment 1 concerning the basis of that order that the employment manual used by appellees without authorization was the basis of the appellees escaping liability in the first case when appellants had correctly sued appellees in the first place)***, because the decision was not based on the Tennessee law of appellees- not Prime Focus – having hired, directed, and fired appellants.

See McGee v. County of Wilson, 574 S.W.2d 744, 746 (Tenn. Ct. App. 1978). The prior December 8, 1999 decision that appellees did not employ appellants was based solely on an innocuous greeting statement in the employee manual which appellees knew or should have known that they had no authority from Prime Focus to use Therefore, appellees cannot rely on the principles of *res judicata* to sustain fraud, and a judgment obtained by fraud may not be used as a basis for the application of the doctrine of *res judicata*. New York life Ins. Co. v. Nashville Trust Co., 292 S.W.2d 749, 755 (Tenn. 1956).

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

YONA BOYD, ET AL. v. DONALD BRUCE, M.D., ET AL.

Circuit Court for Davidson County
No. 00C-2059

No. M2000-03211-COA-R3-CV

ON APPEAL FROM THE TWENTIETH JUDICIAL
DISTRICT CIRCUIT COURT FOR DAVIDSON COUNTY
THE HONORABLE THOMAS W. BROTHERS, JUDGE

BRIEF OF THE APPELLANTS, YONA BOYD AND BRENDA COLLIER

DAVID E. DANNER

ORAL ARGUMENT REQESTED

* * * * *

employee manual presented to appellants by appellees. E.g. Id.[1] The employment relationship between the parties was governed by promises of various forms of compensation supporting appellant Boyd's claim for back wages ($5,440), retirement benefits ($8,336) plus lost fund growth, vacation pay ($1,609), and sick pay ($1,600) for a total amount of $16,985 plus lost fund growth (R. 52), and appellant Collier's claim for back wages ($4,000), retirement benefits ($9,592) plus lost fund growth, vacation pay ($2,693), and sick pay ($576) for a total amount of $16,861 plus lost fund growth (R. 54). The appellees' supplemental promises to appellants establishing specific amounts for forms of compensation promised by the employee manual (R. 51-54) are additional stipulations admissible to further define the terms of the written employee manual. Fulton v. Tennessee Walking Horse Breeder's Association, 476 S.W.2d 644, 652 (Tenn. Ct. App. 1971). Appellants had a contractual right to the specific forms of compensation sued for. Cf Ward v. Berry & Associates, Inc., 614 S.W.2d 372, 376 (Tenn. Ct. App. 1981).[2]

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[1] The employee manual was written by Prime Focus, Inc., a payroll service, but did not make appellants Boyd/Collier employees of Prime Focus, Inc. (R. 40). In the appellees Bruce/D&C presented the employment manual form to appellants (R. 51, 53), then such form became the adopted contractual provision for the relationship between the instant parties Boyd/Collier and Bruce/D&C.

[2] The pension and vacation pay benefits sued for would also provide a basis for a cause of action under ERISA in federal court. 29 U.S.C. 1132(a)(1)(B); 29 U.S.C. 1002(1). State courts have jurisdiction to order employers to pay such pension and vacation pay benefits to employees concurrent with federal courts. 29 U.S.C. 1132(e)(1). But, in cases involving an employment contract such as the instant case, a federal court would necessarily rely on state common law. Adcock v. Firestone Tire & Rubber Co., 616 F.Supp. 409, 414, 416, 417-418 (M.D. Tenn. 1985), *rev'd in part on other grounds*, 822 F.2d 623 (6th Cir. 1986). Therefore, the instant suit is identical in law and fact to a suit which could be brought in federal court solely for the pension and vacation pay benefit portion of the instant case.

Apellants Boyd and Collier are entitled to the promised increase in their pay and benefits because the contractual consideration supporting such pay and benefits was their remaining employees of appelees from June 16, 1994 to July 16, 1999 and September 17, 1990 to June 7, 1999, respectively, Simmons v. Hith, 546 S.W.2d 587, 592 (Tenn. Ct. App. 1976).

Appendix E

28-1-105. New action after adverse decision – Contractual limitations periods. – (a) If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or the plaintiff's representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest. Actions originally commenced in general sessions court and subsequently recommenced pursuant to this section in circuit or chancery court shall not be subject to the monetary jurisdictional limit originally imposed in the general sessions court.

(b) In the case of a contract which limits the time within which an action arising out of such contract must be brought, if such action is commenced within the time as limited by the contract but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or the plaintiff's representatives or successors, as the case may be, may from time to time, commence a new action within one (1) year after the nonsuit, dismissal without prejudice, reversal or arrest. [Code 1858, § 2755 (derive. Acts 1715, ch. 27, § 6,; 1819, ch. 28, § 3); Shan., § 4446; mod. Code 1932, § 8572; T.C.A. (org. ed.), § 28-106; Acts 1985, ch. 344, § 1989, ch. 225, § 1.]

Appendix F

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

YONA BOYD and,	)	**FILED**
BRENDA COLLIER,	)	**1999 DEC-8 PM 3:35**
Plaintiff,	)	**CLERK & MASTER**
	)	**DAVIDSON CO.**
vs.	)	**CHANCERY CT.**
	)	
DONALD BRUCE, M.D.,	)	**Case No.: 99-3716-II**
D&C PROPERTY	)	
MGMT CORP.	)	
Defendants.	)	
	)	

ORDER

This cause came on for Hearing on the 19th day of November, 1999 before the Honorable Chancellor Carol L. McCoy, upon defendants', Donald Bruce, M.D. and D&C Property Mgmt. Corp. Motions to Dismiss for Failure to State a Claim upon which relief may be granted and for failure to join an indispensable party. Present in Court were Thomas L. Whiteside, attorney for Defendants, and David E. Danner, counsel for Plaintiffs, Yona Boyd and Brenda Collier.

The Court after hearing the arguments of counsel for there respective parties and after a complete review of the entire record contained herein, the Court finds the Plaintiffs claims are all dependant upon the existence of an employer-employee relationship between the named plaintiffs and the named defendants.

The Trial Court after taking all of the factual allegations contained in the Complaint as true and construing the Complaint liberally in favor of the plaintiffs the court finds, based upon the plaintiffs allegations contained in ¶ 5 of the

Complaint and the document attached to Plaintiffs complaint as attachment one, finds that the employer-employee relationship was governed by the document which plaintiffs relied upon in there Complaint. Said document unequivocally establish the existence of an employer-employee relationship by and between the named plaintiffs and Prime Focus, Inc.

The Court further finds that the corporation, Prime Focus, Inc. is an indispensable party since the employer-employee relationship alleged in the Complaint existed between the named plaintiffs and Prime Focus Inc. and that the named defendants were the client of Prime Focus, Inc.

The Trial Court finds that no employer-employee relationship existed between the named plaintiffs and the named defendants, Donald Bruce, M.D. and D&C Property Mgmt. Corp.

The Court finds the defendant's Motions to Dismiss well taken.

It is **THEREFORE, ORDERED, ADJUDGED AND DECREED** that Plaintiffs

Complaint is hereby **DISMISSED** for failure to state a claim upon which relief can be granted and for failure to join an indispensable party for a just adjudication.

It is **FURTHER, ORDERED, ADJUDGED AND DECREED** that the costs of this action are assessed against Plaintiffs for which execution may issue if necessary.

So ordered.

/s/_____
Chancellor Carol L. McCoy

Approved for entry:

/s/_____
Thomas L. Whiteside, #16371
Attorney for Defendants
Fowlkes & Whiteside
172 Second Avenue North, Suite 204
Nashville, TN 37201
(615)726-0770

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing was forwarded by U.S. Mail, postage prepaid, to David E. Danner, Washington Square Building, 222 Second Avenue North, Suite 360M, Nashville, TN 37201, this 2nd day of December, 1999.

/s/_____
Thomas L. Whiteside

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

YONA BOYD and,	)	**FILED**
BRENDA COLLIER,	)	**2000 JUL –6 PM 3:45**
Plaintiff,	)	**CLERK & MASTER**
	)	**DAVIDSON CO.**
vs.	)	**CHANCERY COURT**
	)	
PRIME FOCUS, INC.	)	**Case No.: 99-3716-II**
Defendant.	)	
	)	

FINAL ORDER

This matter came to be heard on the 23rd day of June, 2000 upon the cross motions for summary judgment filed by the Plaintiffs, Yona Boyd ("Boyd") and Brenda Collier ("Collier"), and by the Defendant, Prime Focus, Inc. ("Prime Focus"). The Court finds the material facts at issue in this case to be undisputed for purposes of summary judgment.

On August 19, 1999, Boyd and Collier, the Plaintiffs, filed suit against Donald Bruce, M.D. ("Bruce") and D&C Property Mgmt. ("D&C"). The Plaintiffs alleged that Bruce was the owner of D&C, and that D&C was the employer of the Plaintiffs. The Plaintiffs alleged that Bruce/D&C failed to provide promised compensation and benefits to the Plaintiffs pursuant to a 1987 employee manual provided to Plaintiffs by Bruce/D&C.

In the previous lawsuit, the Plaintiffs alleged that all representations forming the basis for their claims against Defendants Bruce and D&C were made directly by Bruce. The Plaintiffs' claims against those parties were dismissed by this Court, based upon this Court's finding of the failure of the Plaintiffs to include an indispensable party, Prime Focus, Inc.

The Plaintiffs did not appeal that Order. Instead, they waited until after the Order was final and then filed suit against Prime Focus, Inc. They subsequently attempted to amend their Complaint to assert previously litigated claims against Bruce/D&C. In granting a motion for sanctions filed by Bruce/D&C, the Court struck the Amended Complaint that asserted the previously litigated claims against Bruce/D&C.

According to the undisputed facts before this Court, Prime Focus is an employee leasing firm which was retained by Donald Bruce on September 17, 1990. As an employee leasing firm, Prime Focus is a company that serves to consolidate the employees of small businesses for purposes solely of supplying those small businesses with payroll services and insurance group benefits. As a payroll service provider, Prime Focus did not issue any payroll or other checks until it had been provided the compensation from Bruce/D&C. In creating a new account, Prime Focus enters into an agreement with a small business which transfers the employees of the small business to employment with Prime Focus solely for health insurance purposes. Prime Foucs, acting as a lessor, then "leases" these employees back to the original small business employer, who acts as the lessee. The undisputed facts, as well as the admissions and arguments of Plaintiffs demonstrate that Prime Focus exercises no control over the hiring, firing or compensation procedures or policies of its small business customers. In addition, its is undisputed that the employment manual relied upon by the Plaintiffs was never provided to Plaintiffs at the direction of Prime Focus since it had been replaced and was no longer valid several years prior to Plaintiffs' employment. In the previous lawsuit, Collier testified under oath and upon personal knowledge as follows:

> I, Brenda Collier, being duly sworn, depose, and state on my personal knowledge, and if I am called as a witness can competently testify, to the following: (1) That I began employment with defendants (Bruce/D&C) on September 17, 1990.

> (2) That I interviewed with defendant Donald Bruce in August, 1990 in his office. (3) That defendants offered me employment on the same day as the interview. (4) That I was not interviewed by any officer, agent, nor employee of Prime Focus, Inc., nor was I offered a job by Prime Focus, Inc. (5) That when I accepted employment with the Defendants in August, 1990, it was not my intent to become an employee of Prime Focus, Inc. (6) That I was not aware of the existence of Prime Focus, Inc. before accepting the defendant's offer of employment in August, 1990. (7) That when I became aware of Prime Focus, Inc., it was my understanding that Prime Focus, Inc. was simply a payroll or consultant service for my employer...

In the previous lawsuit, Boyd testified under oath upon personal knowledge as follows:

> (1) That I began employment with defendants (Bruce/D&C) on June 16, 1994. (2) That I was interviewed with defendant Bruce's wife in his office in May, 1994. (3) That I was not interviewd by any officer, agent, nor employee of Prime Focus, Inc., nor was I offered a job by Prime Focus, Inc. (4) That when I accepted employment with the defendants in 1994, it was not my intent to become an employee of Prime Focus, Inc. (5) That defendant Bruce's wife stated during the interview that Prime Focus, Inc. simply "managed" the employees of the defendants...

According to the undisputed facts before this Court, Bruce/D&C executed an indemnity agreement upon opening an account with Prime Focus, designed to shield Prime Focus from the claims that form the basis of this law suit. The agreement states as follows:

> Lessee [D&C Property Management Corp.] will hold Lessor [Prime Focus], harmless for and against

> any and all claims, demands and/or causes of action regarding operation or management of the Lessee's business and the employment and termination of any employee or former employee of Lessee.

The Court is persuaded by the loaned servant doctrine, that Bruce/D&C exercised the requisite control over the Plaintiffs in their employment that the Plaintiffs must be dealt with as the servants of the one to whom they were lent, Bruce/D&C. The Court funds nothing in the record to indicate that Prime Focus failed to do what it was required to do under a contract with Bruce/D&C. The Court also finds it inappropriate for the Plaintiffs to request the Court to consider arguments regarding the third part beneficiary doctrine where the Plaintiffs have failed to assert a cause of action under this theory in the Complaint. The Court finds that Prime Focus acted only as an employer that lent its employees, Collier and Boyd to Bruce/D&C. The Court finds that Plaintiffs have taken inconsistent positions in this litigation. More specifically, the Plaintiffs have inconsistently asserted that Bruce/D&C was their employer with direct control over them, and that based upon their personal knowledge, Bruce/D&C did not act as the officer, agent, or employee of Prime Focus. When they did not succeed in the previous lawsuit, the Plaintiffs have now taken the position that Bruce/D&C acted as the apparent or actual agent of Prime Focus. The Court rejects this argument, finding that, based upon the Plaintiffs' own testimony contained in their Affidavits, Bruce/D&C did not appear to be the agents of Prime Focus. Based upon these undisputed facts, as well as the arguments of counsel for the parties, the pleadings filed in this case, the memorandums of law, affidavits, and other exhibits and documents submitted is therefore,

ORDERED, ADJUDGED and DECREED that Defendant Prime Focus, Inc.'s Motion for Summary Judgment is granted, that Plaintiffs' Motion for Summary Judgment is denied, and that the Plaintiffs' Complaint is dismissed with prejudice.

Costs are assessed against the Plaintiffs for which execution may issue. (clw)

/s/_____
Chancellor Carol McCoy

APPROVED FOR ENTRY:

/s/_____
John C. Rochford (#18867)
Steven A. Riley (#6258)
Bowen Riley Warnock &
Jacobson, PLC
1906 West End Avenue
Nashville, TN 37203
(615) 320-3700

Attorneys for Prime Focus, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appearance has been forwarded by U.S. Mail, postage prepaid to:

David E. Danner, Esq.
Law Office of David E Danner, P.C.
Washington Square Building
222 Second Avenue North, Suite 360M
Nashville, TN 37201

Thomas L. Whiteside, Esq.
Fowlkes & Whiteside
172 Second Avenue North, Suite 204
Nashville, TN 37201

this 26th day of June, 2000.

/s/_____
John C. Rochford

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

YONA BOYD and,	)	**FILED**
BRENDA COLLIER,	)	**2000 JUL 10 PM 3:09**
Plaintiffs,	)	**CLERK & MASTER**
	)	**DAVIDSON CO.**
vs.	)	**CHANCERY COURT**
	)	
	)	
PRIME FOCUS, INC., ET. AL.	)	**Case No.: 99-3716-II**
Defendants.	)	
	)	

ORDER

This cause came on hearing on the 2nd day of June, 2000, before the Honorable Chancellor Carol L. McCoy, upon defendants, Donald Bruce, M.D. and D&C Property Management Corp., Motion for Sanctions pursuant to Rule 11. Present in Court were Thomas L. Whiteside, attorney for defendants, Donald Bruce, M.D. and D&C Property Management Corp., and David E. Danner, counsel for plaintiffs, Yona Boyd and Brenda Collier.

The Trial Court after hearing the arguments of counsel for their respective parties and after a complete review of the entire record contained herein in the record of *Yona Boyd and Brenda Collier v. Donald Bruce, M.D. and D&C Property Management Corp.*, case no.: 99-2350-II, the Court finds that the newly named defendants Donald Bruce, M.D. and D&C Property Management Corp., were involved in litigation with the named plaintiffs here in the earlier cause of action captioned, *Yona Boyd and Brenda Collier v. Donald Bruce, M.D. and D&C Property Management Corp.*, case no.: 99-2350-II in the Chancery Court for Davidson County,

Tennessee, which case was dismissed by Order entered on December 8, 1999.

The Court finds that no appeal was taken in that first litigation and said Order of Dismissal became a Final Order Thirty (30) days after the entry of the Order.

The Court finds that the doctrine of *Res Judicata* would bar not only the claims which were specifically plead and raised in the first litigation would also bar those claims which could have been litigation in the first lawsuit.

The Court finds that no new facts were alleged in the amended complaint filed by plaintiff's on March 10, 2000 which could not have been litigated in the first lawsuit which ended in the Order of Dismissal of December 8, 1999.

The Court further finds that the plaintiffs improperly joined the defendants, Donald Bruce, M.D. and D&C Property Management Corp., as parties to this action in their Amended Complaint filed on March 10, 2000 in that plaintiffs failed to serve notice of its Motion to join Donald Bruce, M.D. and D&C Property Management Corp. as parties to this action.

The Court finds that the plaintiffs failed to comply with Civil Rule 15 in that plaintiffs did not seek leave of Court to amend their Complaint after a responsive pleading was filed by the defendant, Prime Focus, Inc., in this matter.

The Court finds that the December 8, 1999 Order in case no.: 99-2350-II is clear and that said prior Order would be *res Judicata* as to the claims now raised by plaintiff in its Amended Complaint.

The Court finds that counsel for Donald Bruce, M.D. and D&C Property Management Corp., Inc. sent the appropriate letter prior to initiating the litigation concerning the Motion for Sanctions in this matter.

The Court further finds that plaintiffs has set forth no new facts in its response to the Motion for Sanction which would permit plaintiffs to go forward in this matter.

The Court further finds the Motion of Sanctions well taken.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the Amended Complaint filed on March 10, 2000 is hereby **STRICKEN** from the record and that the defendants, Donald Bruce, M.D., and D&C Property Management Corp., Inc., are hereby **DISMISSED** as parties from this cause of action.

IT **IS FURTHER ORDERED ADJUDGED AND DECREED** that the defendants, Donald Bruce, M.D. and D&C Property Management Corp., Inc., are awarded their reasonable expenses and attorney's fees in pursuing their Motion for Sanctions in the amount of One Thousand Three Hundred Thirty-Seven Dollars ($1,337,50) and Fifty Cents.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the defendants, Donald Bruce, M.D. and D&C Property Management Corp., Inc., are awarded a judgment against plaintiffs in the amount of One Thousand Three Hundred Thirty-Seven Dollars ($1,337.50) and Fifty Cents, for which execution may issue if necessary.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the defendants, Donald Bruce, M.D. and D&C Property Management Corp., Inc., are hereby DISMISSED as parties to this action.

IT IS SO ORDERED.

/s/_____
CHANCELLOR, CAROL MCCOY

Approved for Entry:

/s/_____

Thomas L. Whiteside, #16371
Attorney for Defendants
Fowlkes & Whiteside
172 Second Avenue North, Suite 204
Nashville, TN 37201
(615)726-0770

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing was forwarded by U.S. Mail, postage prepaid, to David E. Danner, Washington Square Building, 222 Second Avenue North, Suite 360M, Nashville, TN 37201, this 28th day of June, 2000.

/s/_____
Thomas L. Whiteside

IN THE 6th CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

YONA BOYD and,	)	**FILED**
BRENDA COLLIER,	)	**2000 JUL 10 PM 3:09**
Plaintiffs,	)	**CLERK & MASTER**
	)	**DAVIDSON CO.**
vs.	)	**CHANCERY COURT**
DONALD BRUCE, M.D.,	)	
D&C PROPERTY	)	**Civil Action No.: 00C-2059**
MGMT CORP.	)	
Defendants.	)	
	)	

FINAL ORDER

This cause came on for hearing on the 20th day of October, 2000, before the Honorable Judge Thomas W. Brothers, upon plaintiffs' Motion for Summary Judgment and upon defendants, Donald Bruce, M.D. and D&C Property Management Corp., Motion for Sanctions. Present in Court were: David E. Canner, counsel for plaintiffs, Yona Boyd and Brenda Collier; and Thomas L. Whiteside, attorney for defendants.

The Trial Court after hearing the arguments of counsel for their respective parties and after a complete review of the entire record contained herein, the Court finds that the defendants Motion for Rule 11 Sanctions is in essence a Motion to Dismiss which Motion to Dismiss is predicated upon the ground that the plaintiffs current action is barred by the doctrine of *res judicata.*

The Court finds that the issues of *res judicata* are fairly raised in the defendants Motion for Rule 11 Sanctions and is fairly before the Court.

The Court further finds that in the interest of judicial economy the Motion for Rule 11 Sanctions shall be treated as a Motion to Dismiss.

The Court further finds that the Court pursuant to **Harris v. Baptist Memorial Hospital**, 574 S.W.2d 730, (Tenn. 1978) finds that the plaintiffs' case should be involuntarily dismissed on the basis that *res judicata* barrs this action.

The Court further finds that the Complaint in this case contains the Order from the Chancery Court, Chancellor McCoy.

The Court further finds that the plaintiffs' argument is that the Chancery Court dismissed the first action (Boyd I) on the bases that the plaintiffs had failed to join a necessary party for just adjudication.

The Court finds that the Order from Chancellor McCoy states an entirely different reason in both the preamble and Order and that the Chancery Court case was dismissed for both a failure to state a claim upon which relief can be granted and for a failure to join an indispensable party.

The Court further finds that said Order was served on the attorney for Plaintiffs', David E. Danner, and that the record contains no indication that pursuant to the local rules that plaintiff had submitted a competing Order.

The Court further finds that there was a later attempt to set aside this December 8, 1999 Order from Chancellor Mc. Coy and that said Motion to Set Aside was denied.

The Court further finds that the Court can only speak through its Orders and that this Court is bound by the Chancery Court Order which explicitly states that the dismissal was for failure to state a claim.

The Court further finds that this is a Final Order **with** prejudice.

The Court further finds that there are genuine issues as to a material fact and the court further finds that *res judicata* is a good valid defense to the plaintiffs' action.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that plaintiffs' Motion for Summary Judgment is hereby **DENIED.**

IT IS FURTHER ORDERED ADJUDGED AND DECREED that plaintiffs' complaint is hereby **DISMISSED** with **PREJUDICE** in the plaintiffs' are barred by the doctrine of *res judicata* having previously litigated this matter in the Chancery Court of Davidson Count, Tennessee in case captioned: *Yona Boyd and Brenda Collier v. Donald Bruce, M.D., D&C Property Mgmt. Corp.*, case # 99-2350-11.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the plaintiffs' pay the costs herein for which execution may issue if necessary.

IT IS SO ORDERED.

/s/_____
HONORABLE THOMAS W. BROTHERS

Approved for Entry:

/s/_____
Thomas L. Whiteside, #16371
Attorney for Defendants
Fowlkes & Whiteside
172 Second Avenue North, Suite 204
Nashville, TN 37201
(615)726-0770

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing was forwarded by U.S. Mail, postage prepaid, to David E. Danner, Washington Square Building, 222 Second Avenue North, Suite 360M, Nashville, TN 37201, this 27th day of October, 2000.

/s/_____
Thomas L. Whiteside